IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2009 Session

DENNIS E. WOOD AND WIFE, SUSAN C. WOOD v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.

Appeal from the Chancery Court for Davidson County
No. 07-1053-I(II) Carol L. McCoy, Chancellor

No. M2008-02570-COA-R3-CV - Filed September 16, 2009

Property owners filed suit against NES and adjacent property owners over the interpretation of an easement agreement created by the property owners' predecessors in interest. NES was later dismissed from the suit. The trial court found that the easement agreement was ambiguous, that the easement included utilities, and that the plaintiff property owners unreasonably withheld their consent to the installation of utilities for the defendant property owners. The plaintiff property owners appealed. We find that the easement is not ambiguous, that the plaintiff property owners have a right to withhold their consent, and that the plaintiff property owners are entitled to their attorney fees.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

James Carson Hofstetter, Nashville, Tennessee, for the appellants, Dennis E. Wood and Susan C. Wood.

James B. Lewis, Peter D. Heil, and Robert B. Young, Nashville, Tennessee, for the appellee, Lewis K. Johnson.

OPINION

This case is about the use of an easement that neither party to this action created. The easement was established by the prior owners of the Wood property, the Joneses, and the prior owners of the Johnson property, the Owen heirs. The Easement Agreement's first four paragraphs are pertinent to this matter:

1. Grant of Easements. Jones hereby grants to the Owen Heirs and the Owen Heirs hereby grant to Jones an easement for ingress and egress across their respective properties as is shown on the plat attached hereto as Exhibit "A". It is intended that each of the parties will be contributing an 18-foot-wide strip of land, contiguous to the other, to form a 36-foot-wide strip, for use as a road, and for their own use. The easement granted by Jones shall serve the Owen Heirs' Property, and the easement granted by the Owen Heirs shall serve the Jones Property.

2. Use of Easements. It is specifically intended that the easement hereby granted by each of the parties shall be used solely for ingress and egress of vehicles and persons from Old Hickory Boulevard to the residences now or hereafter situated on the Jones Property and the Owen Heirs' Property. Parking of vehicles on the easements is not to be permitted. The easements are not to be used to benefit or serve any non-residential use or activity on the Jones Property or the Owen Heirs' Property.

3. Restrictions of Use. Notwithstanding anything to the contrary contained herein, it is intended that the easements will serve a maximum of two (2) residences on the Owen Heirs' Property and a maximum of two (2) residences on the Jones Property. It is not intended that the easements will serve or benefit any other properties or more than two (2) residences on either of the Owen Heirs' Property or the Jones Property. This restriction may be changed only by a writing signed by all the then owners of the Jones Property and the Owen Heirs' Property. If a party should violate this provision, then the other party may, without further notice, revoke the grant of easement made herein and the terms of this Agreement.

4. Improvements, Maintenance and Repair. It is specifically agreed that all maintenance costs and repairs for the land and improvements included in the above granted easements shall be borne equally by and between Jones and the Owen Heirs. No improvements are to be made upon the easements except with the mutual agreement of Jones and the Owen Heirs. All decisions regarding maintenance or repairs, the construction of the road, placement of utilities and other improvements shall be joint decisions of Jones and the Owen Heirs, and they shall contribute at the same times for any costs.

The 36-foot-wide easement runs approximately 1,440 feet from Old Hickory Boulevard along the southern edge of the Wood property and the northern edge of the Johnson property.

When the Woods bought the property in 1995, utility service for the property already ran through the easement. In 2001 and 2005, when Lewis Johnson purchased the two tracts that comprise his property, no utility service ran to those properties.

The controversy that developed into this lawsuit began when Johnson requested Nashville Electric Service ("NES") to supply electric service to his property. The Woods, relying on the advice

of their attorney, steadfastly maintained that the easement was for ingress and egress alone. They refused to consent to Johnson's utilities going through the easement. They refused to sign a proposed easement from NES. The Woods and Johnson did discuss various alternatives; none of which were satisfactory to both parties.

Johnson supplied NES with an opinion of counsel stating that the easement included utilities. He also acquired affidavits from two of the original signers of the easement, Geoff Jones and Phillip McKee, stating that they intended the easement to provide utility service as well as ingress and egress to the properties. Johnson caused these affidavits to be recorded in the Register's Office of Davidson County.

NES eventually decided that it would move forward and notified Mr. Wood that it would be setting a new pole in the easement. The Woods filed this lawsuit against NES and Lewis Johnson on May 10, 2007, and sought a temporary restraining order. The restraining order was denied, but a hearing was held on the Woods' application for a temporary injunction on May 17, 2007. The trial court enjoined NES from entering the easement for the purposes of installing electrical power poles, transmission lines, or other electrical equipment to service the Johnson properties. Many delays followed. The Woods' motion for summary judgment was heard on January 25, 2008. It was denied on February 8, 2008. Three days later, the trial court entered an agreed order dismissing NES from the case.

On July 7, 2008, the case was tried before the court. The trial court found that the easement agreement was ambiguous and that extrinsic evidence was admissible to assist in its interpretation; that the recorded affidavits of Jones and McKee did not constitute a cloud on the Woods title; that Johnson did not breach the agreement; that Johnson had a right to use the easement for utilities; and that neither party was entitled to an award of attorney fees. The Woods filed a motion to alter or amend, which was denied. They then filed this appeal.

Standard of Review

The trial court's findings of fact are reviewed de novo, with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). We review the trial court's conclusions of law de novo with no presumption of correctness. *Simonton v. Huff*, 60 S.W.3d 820, 825 (Tenn. Ct. App. 2000). The construction of a contract is a question of law. *Id.*

Scope of the Easement Agreement

The trial court found the Easement Agreement contained an ambiguity that "caused difficulty between these two parties." The ambiguity, according to the court, was created by the drafter's placement of the reference to utilities in section 4 rather than in section 2. The agreement was written this way, according to the drafter, Mr. McLemore, because Mr. Jones did not think the Owen heirs would sign the agreement if utilities were included in section 2.

We must respectfully disagree with the chancellor in that we do not find the agreement to be ambiguous. The Easement Agreement is a contract. "The cardinal rule of contract interpretation is that the court must attempt to ascertain and give effect to the intention of the parties." *Id.* Their intention is ordinarily ascertained from the usual, natural, and ordinary meaning of the language used in the contract. *Id*. If the language of the contract is not ambiguous, the court determines the intention of the parties from the four corners of the contract. *Id.* The contract should be read as a whole. *Carolyn B. Beasley Cotton Co. v. Ralph*, 59 S.W.3d 110, 113-14 (Tenn. Ct. App. 2000). As we read the Easement Agreement, the parties intended to create an easement for ingress and egress for their properties. Decisions regarding the construction of the road, maintenance, repairs, and the placement of improvements, such as utilities, within the easement were to be made jointly by the parties. Thus, the agreement envisioned the placement of utilities in the easement if done pursuant to a joint decision.

Withholding of Consent

The Woods maintain that they have an absolute right to withhold their consent to the placement of more utilities in the easement. In the alternative, they argue that their reasons for not granting consent, the safety of their child and preservation of the view from their home, are reasonable. The chancellor found that "[i]t is in keeping with the intent of the easement agreement and the purpose for which it was drawn that the parties would reasonably agree to the installation of utilities . . . ." The chancellor further stated that "[t]he Court does not find persuasive at all the justification that the refusal was based on concern for the Woods' daughter's safety or the view . . . ." The evidence does not preponderate against the chancellor's finding that the justifications offered for the denial of consent were unpersuasive. Thus, we are left with the legal question of whether the language of the easement allows the Woods the unfettered right to withhold their consent.

The chancellor found that the original parties anticipated that they "would use this egress and ingress easement and that utilities would also be serviced on that easement." We respectfully disagree with the chancellor as to the utilities. The pertinent language regarding the utilities is in section 4 of the Easement Agreement:

> No improvements are to be made upon the easements except with the mutual agreement of Jones and the Owen Heirs. All decisions regarding maintenance or repairs, the construction of the road, placement of utilities and other improvements shall be joint decisions of Jones and the Owen Heirs, and they shall contribute at the same times for any costs.

Utilities were considered improvements to the easement. Decisions about improvements were to be made by "mutual agreement." Such matters required "joint decisions." There is no ambiguity in this language. Each party had to agree to any improvement, including utilities, or the improvement could not be made. In essence, they agreed that they could agree to make improvements to the easement.

The trial court found that the parties intended that mutual decisions would be reasonably made. We see no such intent in the four corners of the Easement Agreement. Mr. Johnson invokes the implied duty of good faith and fair dealings that is a part of every contract.

> [T]here is an implied undertaking in every contract on the part of each party that he will not intentionally or purposely do anything . . . which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counterpromise against arbitrary or unreasonable conduct on the part to the promisee.

Winfree v. Educators Credit Union, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995) (quoting 17 AM. JUR. 2d, *Contracts*, § 256 (1964)). Here, the parties merely agreed that improvements could be made in the easement if the parties agreed to the improvements. No conditions on such future agreements are expressed. There are no fruits of the agreement to be lost in this instance by the Woods' obstinance because there is no promise of agreement, only a possibility. The Woods have the right to withhold their consent for any reason, justifiable or not.

Jones and McKee Affidavits

As we previously noted, Johnson acquired affidavits from Geoff Jones and Phillip McKee, two of the original signers of the easement, stating that they each intended the easement to provide ingress and egress as well as utility service to the properties. Johnson caused these affidavits to be recorded in the Register's Office of Davidson County. In the order denying the plaintiffs' motion to alter or amend, the trial court held that the affidavits were recordable under Tenn. Code Ann. §§ 66-24-101(a)(26)(A) and (a)(27).

> Tenn. Code Ann. § 66-24-101(a)(26)(A) allows the registration of:
> Any instrument that provides for any party to agree to take any action regarding any interest in real property, or not to take such action regarding any interest in real property, including, but not limited to, any agreement to or negative agreement to mortgage, pledge, assign, hypothecate, alienate, subdivide, encumber, sell, transfer or otherwise affect the real property or any part thereof.

This court has described Tenn. Code Ann. § 66-24-101(a)(26)(A) as a "catchall" provision, *Washington Mut. Bank v. N.K.T. Land Acquisitions Inc.*, No. M2007-02040-COA-R3-CV, 2008 WL 2925299, at *8 (Tenn. Ct. App. July 23, 2008) (no Tenn. R. App. P. 11 application filed), meaning that it is intended to bring within the registration statute instruments or documents not specifically listed in other provisions of the act. In our opinion, the affidavits of Geoff Jones and Phillip McKee do not fit within the scope of Tenn. Code Ann. § 66-24-101(a)(26)(A). The affidavits do not provide that any party will take or refrain from taking any action as to the real property. They do not affect the real property in any way. Rather, the affidavits state the signatories' intent regarding the easement agreement.

Similarly, Tenn. Code Ann. § 66-24-101(a)(27) does not apply since the affidavits do not deal with a scrivener's error or further the identification and title to property. Therefore, the affidavits of Geoff Jones and Phillip McKee are not eligible for recording and should be expunged.

Status of the Easement Agreement

In their complaint, the Woods sought a declaration that Johnson violated the Easement Agreement and that, therefore, the Woods could terminate or revoke the agreement. They have renewed this request on appeal.

An honest disagreement over the interpretation of the Easement Agreement is not itself a violation of the agreement. Section 3 of the Easement Agreement states: "If a party should violate this provision, then the other party may, without further notice, revoke the grant of easement made herein and the terms of this Agreement." While Johnson did involve NES and did obtain and record the affidavits of Jones and McKee to bolster his interpretation of the agreement, no actual violation of the agreement occurred. Section 3 deals with the limitation of two residences per property.

The Woods filed this suit before anything happened within the easement. Under the circumstances, termination or revocation of the Easement Agreement is not justified.

Attorney Fees

Section 6 of the Easement Agreement states: "Each of the parties hereby agrees to indemnify and hold harmless the other for any loss, damage, or injury, including attorneys' fees, caused to the other party by reason of acts or omissions of the party." The Woods argue that this provision entitles them to a judgment against Johnson for their attorney fees at trial and on appeal. The trial court determined that a more carefully drawn easement agreement would have eliminated the problems between the parties. Apparently due to the fact that neither party to the litigation was responsible for the drafting of the agreement, the trial court did not award attorney fees to either party.

Section 6 plainly says that one party agrees to indemnify the other party for attorney fees caused by the first party's acts. Mr. Johnson's acts caused the Woods to file suit. Therefore, the Woods are entitled to reasonable attorney fees from Mr. Johnson. We remand the issue of the amount of the fee award to the trial court for determination.

Costs of appeal are assessed against Mr. Lewis Johnson, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE